

FCC MAIL SECTION

Federal Communications Commission

FCC 99-407

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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of

The Commission's Forfeiture
 Policy Statement and Amendment
 Of Section 1.80 of the Rules to Incorporate
 the Forfeiture Guidelines

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CI Docket No. 95-6

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1999

Released: December 28, 1999

By the Commission:

I. INTRODUCTION

1. In this order, we deny two petitions for reconsideration of *Report and Order* in this proceeding,¹ both relating to interpretation of Section 504(c) of the Communications Act of 1934, as amended, ("the Act"), 47 U.S.C. § 504(c). We also provide guidance regarding our interpretation of the downward adjustment criterion for minor violations.

II. BACKGROUND

2. In the *Report and Order*, the Commission established general forfeiture policies. In so doing, it said that in determining the forfeiture amount in a notice of apparent liability ("NAL"), it would continue to look at facts underlying prior NALs issued to that party. The Commission rejected the argument that this contravenes Section 504(c) of the Act, which provides that the fact of the Commission's issuance of an NAL shall not be used in any other proceeding before the Commission to the prejudice of the person to whom the NAL was issued unless the forfeiture has been paid or a court has ordered payment and the order has become final. 47 U.S.C. § 504(c). Consistent with Section 504(c) of the Act, the Commission reiterated that it would continue its policy of not using the mere issuance of or failure to pay an NAL to the prejudice of the party. The Commission concluded, however, that "using the *underlying facts* of a prior violation that shows a pattern of non-compliant behavior against a licensee in a subsequent renewal, forfeiture, transfer, or other proceeding does not cause the prejudice that Congress sought to avoid in Section 504(c)."² CBS Radio and Tidewater Communications, Inc. ("Tidewater"), ask us to reconsider this aspect of the *Report and Order*.

¹ 12 FCC Rcd 17087 (1997).

² *Id.* at 17103 (¶ 34) (emphasis added).

III. DISCUSSION

3. The language of the statute supports the Commission's interpretation:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, *that fact* shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

47 U.S.C. § 504(c) (emphasis added). The statute says that the *issuance of an NAL* shall not be used against a person unless the forfeiture has been paid or the person is subject to a final court order to pay. It does not say that the facts underlying prior NALs shall not be used against a person. As CBS Radio itself says, "that language is abundantly clear -- the Commission may not, under any circumstances, use *the existence of an unadjudicated forfeiture decision* 'in any other proceeding before the Commission[] to the prejudice of the person to whom such notice was issued . . .'"³ As the Commission made clear in the *Report and Order*, we will not use the existence of an unadjudicated NAL against a person.⁴ We will thus not penalize someone for challenging the NAL rather than paying it. Rather, we will look only to the facts underlying prior NALs to determine whether the person is engaging in a pattern of non-compliant behavior.

4. The legislative history confirms our reading of the statute. Although the Senate Commerce Committee Report noted that the Commission could not use the pendency of a forfeiture action prior to final adjudication against a licensee, the report went on to say:

[S]ubsection (c) . . . is not intended to mean that the facts upon which a notice of forfeiture liability against a licensee is based cannot be considered by the Commission in connection with an application for renewal of a license, for example, or with respect to the imposition of other sanctions authorized by the Communications Act of 1934
[F]acts going to the fitness of a licensee could be introduced in evidence against such licensee notwithstanding that such facts are the basis of an order of forfeiture.

12 FCC Rcd at 17103 (¶ 33) (quoting S. Rep. No. 1857, 86th Cong., 2d Sess. 11 (1960)). The Senate Report also says that "[t]he licensee could not, therefore, complain of the introduction of such evidence so long as he has the right to cross-examine the witnesses introducing it and the further right to offer evidence to

³ CBS Radio Petition at 7 (emphasis added).

⁴ 12 FCC Rcd at 17103 (¶ 34). See also *Letter to Evergreen Media*, 8 FCC Rcd 1266, 1267 n.5 (1993) ("Consistent with the provisions of Section 504(c) of the Communications Act, we do not take into account in today's action the fact that this forfeiture order remains outstanding; we simply cite it to exemplify the pattern of apparent misconduct warranting the fine we set today.").

rebut it."⁵ CBS Radio quotes this language and says that "because licensees are not afforded any cross examination or any similar procedural rights in the NAL context, the facts or conduct underlying a mere forfeiture notice may not be used as the basis for an upward adjustment in a subsequent forfeiture proceeding."⁶ To the contrary, as explained in the *Report and Order*,⁷ the licensee will always have the opportunity to present evidence that the underlying facts relied on by the Commission did not constitute a violation. It can do this before it is required to pay by introducing evidence to that effect either in a Commission hearing (e.g., a renewal, transfer or forfeiture hearing) or in a court action to enforce a forfeiture.

5. This interpretation is not only consistent with the language of the statute and the legislative history, but it is the most logical implementation of the forfeiture scheme. It seems readily apparent that the Commission has authority to take into account, in assessing a forfeiture, a history of violations by a party that had not been the basis for prior NALs. That is, for example, if a licensee committed a minor violation of a rule, were admonished for it and then committed the same violation again, the Commission could take the first violation into account in setting a forfeiture amount for the second violation. But, under petitioners' interpretation, if the first violation had been a more serious one that led to a forfeiture, the Commission could not take into account the first violation in setting the forfeiture amount for the second violation. This would be illogical, to say the least.

6. CBS Radio's other arguments, focusing on the indecency context, are also unavailing. First, contrary to CBS Radio's suggestion that the *ACT IV* case⁸ "indicates that the Commission's current interpretation of its authority under Section 504(c) is constitutionally suspect -- under the First Amendment,"⁹ the court in *ACT IV* in fact rejected a facial challenge to the Commission's procedures for imposing forfeitures for the broadcast of indecent materials,¹⁰ rejected the plaintiffs' First Amendment challenge,¹¹ and explicitly declined to address the plaintiffs' argument under Section 504(c) of the Act.¹² Second, CBS Radio argues that "administrative delays at both the Commission and the Department of Justice effectively preclude prompt judicial action" and thus, "the Commission's contention that the use of the underlying facts of an unadjudicated NAL in subsequent Commission proceedings does not

⁵ 12 FCC Rcd at 17104 (¶ 36) (quoting S. Rep. No. 1857, 86th Cong., 2d Sess. 11 (1960)).

⁶ CBS Radio Petition at 4.

⁷ 12 FCC Rcd at 17103, 17104 (¶¶ 35, 36).

⁸ *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 773 (1996) ("*Act IV*").

⁹ CBS Radio Petition at 7.

¹⁰ 59 F.3d at 1259.

¹¹ *Id.* at 1260.

¹² *Id.* at 1255, 1260.

prejudice the licensee rings particularly hollow."¹³ In *ACT IV*, however, the court upheld the Commission's procedures for imposing forfeitures for the broadcast of indecent materials. The court rejected the claim "that the delay allows the FCC to take action against them [licensees] without affording them the procedural safeguards necessary to avoid any abridgment of their first amendment rights."¹⁴ The court also suggested that "a broadcaster 'suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding . . . could bring a declaratory judgment action against the United States in the district court.'"¹⁵ Third, contrary to CBS Radio's argument that the Commission's indecency standard is vague and causes a "chilling effect on freedom of speech" that "exacerbates the prejudice to which broadcasters will be subjected if the Commission's interpretation of Section 504(c) is permitted to stand,"¹⁶ the courts have repeatedly upheld the Commission's indecency standard against vagueness challenges.¹⁷ The Supreme Court's decision in *Reno v. ACLU*,¹⁸ which struck down an indecency standard applied to the Internet similar to that applied to the broadcast medium, did not question (as suggested by CBS Radio¹⁹) the constitutionality of the Commission's indecency standard in the broadcast context, but rather reinforced it.²⁰ Fourth, CBS Radio criticizes the Commission for not having published "industry guidance" relating to broadcast indecency.²¹ While we still intend to issue such guidance, we continue to believe that our existing rulemaking orders and case law provide sufficient guidance to avoid any constitutional defect. Finally, there is no basis for CBS Radio's argument that a statement made by a Commissioner suggested that he had prejudged the merits of future indecency cases.²² In any event, the issue is moot since that Commissioner no longer is a member of the Commission.

¹³ CBS Radio Petition at 9.

¹⁴ 59 F.3d at 1255, 1260.

¹⁵ *Id.* at 1262 (quoting *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496, 502 (D.C. Cir. 1977)).

¹⁶ CBS Radio Petition at 12.

¹⁷ See, e.g., *Action for Children's Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) ("*Act III*") ("At the outset, we dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *Act II*, where we stated that 'the Supreme Court's decision in *Pacific* dispelled any vagueness concerns attending the [Commission's] definition,' as did our holding in *Act I*"), *cert. denied*, 116 S. Ct. 701 (1996).

¹⁸ 117 S. Ct. 2329 (1997).

¹⁹ CBS Radio Petition at 11 n.6.

²⁰ 117 S. Ct. at 2343 (referring to the "special justifications for regulation of the broadcast media that are not applicable to other speakers").

²¹ CBS Radio Petition at 10.

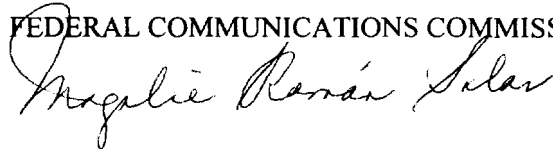
²² CBS Radio Petition at 12-13.

7. Finally, on our own motion we provide the following guidance regarding the downward adjustment factor for minor violations set forth in our rules. This factor is intended to reflect the direction in Section 503(b)(2)(D) of the Act that the Commission take into account in setting forfeiture amounts, among other things, the "gravity of the violation" 47 U.S.C. § 503(b)(2)(D). Some violations may be minor within the same specific category of violation. The fact that the violation involved is statutory does not affect this analysis. Accordingly, we reverse the Commission's prior statement that no statutory violation can be deemed to be minor for purposes of making downward adjustments to a forfeiture amount.²³

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED THAT, the petitions for reconsideration filed by CBS Radio and Tidewater Communications, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

²³ *Paging Network of Los Angeles, Inc.*, 8 FCC Rcd 1702 (1993). See also *Catherine Wadill*, 13 FCC Rcd 23861 (1998) (citing *Paging Network*.)